File:

Date:
JUL 19 2000

In re:

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Joyce Antila Phipps, Esquire

ON BEHALF OF SERVICE: Charles Parker, Jr.
District Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony

APPLICATION: Relief pursuant to the Convention Against Torture[1]

The respondent appealed the Immigration Judge's decision dated January 7, 2000, which denied his application for deferral of removal under the Convention Against Torture. The request for oral argument is denied. *See* 8 C.F.R. § 3.1(e). The appeal will be dismissed.

The respondent, a male native and citizen of Colombia, was admitted to the United States on September 6, 1986, as a visitor (Exh. 1). On September 20, 1991, he was granted lawful permanent resident status on a conditional basis predicated on his marriage to a United States citizen (Exh. 1). This matter was last before us on March 8, 1999, when we remanded the case to permit adjudication by the Immigration and Naturalization Service ("Service") of the respondent's previously filed petition under section 216 of the Immigration and Nationality Act ("Act"), 8 U.S.C. § 1186,

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[1] The United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted and opened for signature Dec. 10, 1984, G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984) (entered into force June 26, 1987; for the United States April 18, 1988) ("Convention Against Torture"). On October 21, 1998, legislation was signed into law directing the promulgation of regulations to implement the obligations of the United States under Article 3 of the Convention Against Torture, subject to any reservations, understandings, declarations, and provisions contained in the United States Senate resolution of ratification of the Convention. *See* section 2242 of the Foreign Affairs Reform and Restructuring Act of 1998, enacted as Division G of the Omnibus Consolidated and Emergency Supplemental Appropriations Act for Fiscal Year 1999, Pub. L. No. 105-277, 112 Stat. 2681-761, 822 (Oct. 21, 1998).

to remove the conditions on his permanent resident status (Tr. at 1-2, 8). *See Matter of Jiminez*, A29 760 024 (BIA Mar. 8, 1999) (unpublished). The conditions have been removed, and the respondent admitted the previously contested allegation in the Notice to Appear and conceded removability as charged (Tr. at 2-3, 8). *See* Exh. 3 (Notice of Removal of Conditional Basis of Lawful Permanent Residence).

On July 18, 1995, the respondent was convicted, upon a plea of guilty, for the offense of conspiracy to possess with intent to distribute cocaine (Exh. 2 at 1). *See* 21 U.S.C. § 846; Exh. 7. He was sentenced to 36 months of imprisonment for that conviction (Exh. 2 at 2). The respondent conceded that he has been convicted of a "particularly serious crime," which renders him ineligible for withholding of removal (Tr. at 40). *See* section 241(b)(3)(B)(ii) of the Act, 8 U.S.C. § 1231(b)(3)(B)(ii); *Matter of L-S-*, Interim Decision 3386 (BIA 1999); *Matter of S-S-*, Interim Decision 3374 (BIA 1999); *Matter of U-M-*, 20 I&N Dec. 327, 330-31 (BIA 1991); *Matter of Gonzalez*, 19 I&N Dec. 682 (BIA 1988); *Matter of Frentescu*, 18 I&N Dec. 244 (BIA 1982); *see also Ramirez-Ramos v. INS*, 814 F.2d 1394 (9th Cir. 1987); *Mahini v. INS*, 779 F.2d 1419 (9th Cir. 1986). The respondent sought deferral of removal under the Convention Against Torture. *See* Exh 4; Tr. at 40; 8 C.F.R. § 208.17 (2000). The Immigration Judge denied the respondent's application and ordered him removed to Colombia (I.J. at 5-7).

The respondent has raised two assignments of error on appeal. First, he contends that "the Immigration Judge erred in finding that the evidence presented . . . did not sufficiently establish that it is more likely than not that the [he] would be tortured upon his return to Colombia." Notice of Appeal (Form EOIR-26) at 1.

The respondent alleged that he is afraid to return to Colombia because his co-defendants, who were also the subject of drug-related conspiracy charges, "might take reprisals against him" (Tr. at 28-30). *See* Tr. at 16. The respondent testified that in 1994, 20 to 25 people, including himself, were arrested for a conspiracy to possess cocaine with intent to distribute (Tr. at 16-17). According to the respondent, all of the individuals involved in the conspiracy were from Colombia (Tr. at 17-18). The respondent testified that he was acquainted with only one of the other members of the conspiracy (Tr. at 18). The respondent claimed that he had a "minor role" in the conspiracy (Tr. at 17). He explained that the whole conspiracy involved 100 to 150 kilograms of cocaine, but he would only have been given 500 grams of cocaine (Tr. at 18). The respondent further explained that the other conspirators knew that his role was comparatively minor (Tr. at 37-39). The respondent's relatively minor role in the offense is documented in the Presentencing Investigation Report (Exh. 7 at 11; Tr. at 49). The respondent claimed that he "cooperated with the trial attorney in [his] case" and told the attorney "what [he] knew about [his] case" (Tr. at 19). The respondent, who received a 3-year sentence, testified that the lightest sentence of any of his codefendants was 5 years, and that most of the persons involved in the conspiracy received 7 to 9-year sentences (Tr. at 19). *But see* Exh. 7 at 6 ¶¶ 18, 20 (two other defendants were convicted of lesser offenses than the respondent and were sentenced under more lenient provisions of the sentencing guidelines). *See* U.S. Sentencing Guidelines Manual § 2D1.1(c)(7), (8), (12) (1995). The respondent served his sentence in the Loreto, Pennsylvania, penitentiary along with three other members of the conspiracy (Tr. at 19). Prior to serving his sentence, the respondent was released for 10 months on a $50,000 surety bond

(Tr. at 20-21). *See* Exh. 7. The respondent testified that in prison, on September 7, 1995, one of his co-defendants told him that "they[2] thought that since [he] has out on bond and also because [he] went in [to prison] voluntarily . . . they thought that [he] *might* have said something . . . to the Government about them" (Tr. at 22) (emphasis added). *See also* Tr. at 23-26. The respondent has heard that two of his co-defendants have been deported to Colombia (Tr. at 27-28). The respondent testified that he believes that the other people involved in the conspiracy "might kill [him]" and that "something bad might happen to [him] and also to [his] family" if they returned to Colombia (Tr. at 30). The respondent claimed that his co-defendants will know he has returned to Colombia because "they can get information [from informers] in any part of Colombia" (Tr. at 31).

The respondent has a number of relatives in the United States and Colombia (Tr. at 31). He testified that no one in his family in either country has been harmed (Tr. at 31). The respondent also testified that he has not been harmed, either in prison or since his release in January 1998 (Tr. at 32, 36-37). The respondent testified that he believes he has not been harmed here because "the law here is harsh" and "people are afraid to commit a crime here" (Tr. at 32). In Colombia, however, the respondent claimed that "they kill people every day and nothing happens" (Tr. at 32).

We affirm the Immigration Judge's determination that it is not "more likely than not" that the respondent would be tortured in Colombia (I.J. at 5-7). *See* 8 C.F.R. § 208.16(c)(2). The respondent's request for protection under the Convention Against Torture is predicated on one equivocal statement made to him by a codefendant of the conspiracy approximately 5 years ago (Tr. at 22). At that time, the codefendant merely said that he and other unspecified codefendants thought the respondent "might" have said something to the government about them (Tr. at 22). This codefendant did not threaten the respondent, and the respondent was not subsequently threatened. We note that the respondent was not harmed in prison, or after his release, even though he lived openly in the area where he lived previously (Tr. at 36-37; I.J. at 5-6). We also agree with the Immigration Judge that the respondent's comparatively light sentence is conversant with the limited role that he played in the conspiracy (I.J. at 6). The respondent testified that the other individuals in the conspiracy were aware of his minor role, and that he would only have had access to 500 grams of cocaine, which less than one-half of one-percent of the total amount of cocaine involved (Tr. at 17-18, 37-39, 49; Exh. 7). We also note that prior to the respondent's conviction, he had only been acquainted with one of the other codefendants, and had little knowledge of the overarching conspiracy, such as the names or locations of the other individuals involved (Tr. at 18). Although the respondent indicated that he cooperated with the prosecuting attorney, the Presentencing Investigation Report demonstrates that the only "assistance" the respondent provided was "by timely notifying the authorities of his intention to enter a plea of guilty" (Exh. 7 at 8). While the respondent's sentence is lighter than a number of his co-conspirators, we note that two of the other defendants, who were involved with relatively small quantities of cocaine, received lighter sentences than the respondent, and that charges were dismissed altogether against three of the alleged co-conspirators (Exh. 7 at 5-7). Furthermore, among the remaining coconspirators, sentences varied depending on the level of their involvement in the conspiracy (Exh. 7 at 4-7). Based on these circumstances, and despite the comment made to the respondent in prison, we find that it is highly

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[2] "They" appears to refer to that co-defendant, and one or more of the other co-defendants.

unlikely that any of the remaining codefendants would seek to torture the respondent based on a mistaken hunch that he told the government "something about them" (Tr. at 22). Even assuming that the facts most favorable to the respondent were true, they do not establish that the alleged torture would be "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity," which is required to establish eligibility for relief (I.J. at 6-7). 8 C.F.R. § 208.18(a)(1) (2000).[3] The respondent's claim that he will be killed by a codefendant who has already been deported to Colombia, or by some other individual acting on behalf of a codefendant who is still in prison in the United States, does not satisfy this requirement. *See id.*[4]

Second, the respondent contends that "the Immigration Judge erred in denying [his] motion to allow his out-of-state expert testify telephonically." Notice to Appeal at 1; *see* Respondent's Letters to Immigration Judge of Dec. 22, 1999, and Dec. 29, 1999. The respondent lacked the funds to transport the prospective witness from Illinois to New Jersey for the hearing (Tr. at 10). The Immigration Judge denied the respondent's request for telephonic testimony because he did not

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[3] *See* 8 C.F.R. § 208.18(a)(7) ("Acquiescence of a public official requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity").

[4] We do not find that the additional documentary evidence submitted by the respondent otherwise satisfies his burden of proof for deferral of removal. *See* 8 C.F.R. § 208.16(c)(2); Exh. 6, Bureau of Democracy, Human Rights, and Labor, U.S. Dept. of State, *Colombia Country Report on Human Rights Practices for 1998* (Feb. 26, 1999) (we note that the State Department has not commented on any cases where there have been reprisals against individuals similarly situated to the respondent); Exh. 6, Bureau of Democracy, Human Rights, and Labor, U.S. Dept. of State, *Colombia – Profile of Asylum Claims and Country Conditions* (June 1997) (same); Exh. 6, Hearings before the House Judiciary Committee (July 29, 1999) (statement of Donnie R. Marshall, Acting Administrator, Drug Enforcement Agency) (noting that because of the "cell" structure of the Colombian drug cartels, individual members are insulated from knowing too much about overall strategies and operations); Exh. 4 (various articles discussing generalized violence in Colombia). Although some of the respondent's documentary evidence discusses threats and violence directed against informants who played significant roles in securing the convictions of individuals in the drug trade, we do not find that this evidence establishes that the respondent would be harmed. *See, e.g. Exh.* 6, Michael Ziegler, *Judge Backs Decision to Detain Drug Dealer*, N.Y.L.J., Feb. 11, 1998, at 2 (noting that "threats had been received by a major informant" who helped secure the conviction of Holmes Ortiz, a member of the Cali drug cartel who is serving a sentence of 88 years to life in prison for his role in supervising the cartel's activities in New York); Michael Hemphill, *Reports Say Cruz is Dead: Javier Cruz Served as a Spy for DEA, then Jumped Bail*, THE ROANOKE TIMES, Aug. 10, 1999 (Cruz spent roughly "four years in Colombia posing as a money laundered to gain information on the Cali cartel, for which the DEA paid him $347,000"); Pedro Ruz Gutierrez, *Informant's Widow Lives in Fear*, THE ORLANDO SENTINEL, Nov. 7, 1999 (concerning a "drug cartel chemist-turned-DEA informant" who identified cocaine-laced shampoos and helped the DEA "keep abreast of the latest smuggling techniques by deciphering complex formulas").

"know this expert," would not know who was "on the other end of the telephone" (Tr. at 9), and was not satisfied that the testimony would be "properly record[ed] and transcribe[d]" (Tr. at 10).[5] However, the Immigration Judge admitted the written proffer of the expert's testimony into the record and stated that he would "give it the weight that [he] think[s] is appropriate in light of the fact that the expert has not appeared for cross examination" (Tr. at 10). *See* Exh. 6, Expert Opinion.

An alien in removal proceedings "shall have a reasonable opportunity . . . to present evidence on [his or her] behalf." Section 240(b)(4)(B) of the Act, 8 U.S.C. § 1229a(b)(4)(B). A violation of such a statutory right may be disregarded as harmless error so long as the violation is not fundamentally unfair and does not demonstrably prejudice the alien. *See Matter of Santos*, 19 I&N Dec. 105, 107-08 (BIA 1984) (*citations omitted*). Although we agree with the respondent that it would have been appropriate for the Immigration Judge to allow the expert witness to testify telephonically,[6] we find that the respondent has failed to establish that the Immigration Judge's

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[5] The Immigration Judge ruled as follows: "Well I'm not going to, I'm not going to allow it for a number of reasons. First of all I don't know this expert so I don't know who's on the other end of the telephone. And I'm not satisfied that the type of testimony that we usually get with an expert testifying on direct and then cross-examination is appropriate for a telephonic hearing in terms of being sure that we can properly record and transcribe all of his, all his testimony. Immigration Judge is responsible for the record and I'm not satisfied that the technology is good enough especially after reviewing transcripts and decisions that come back from their transcribers when people are in front of me and talking directly into the microphone. I'm not satisfied that everything that is said over a telephone would be subject to transcription. So I'm not allowing a person that I don't know to testify by telephone and with the other problems that you have" (Tr. at 9-10).

[6] We do not find that the Immigration Judge's concerns that he did not know the witness and could not be sure who he was speaking with on the phone were sufficient grounds to refuse telephonic testimony by this witness. *See* Tr. at 9-10. The respondent submitted evidence which would have allowed the Immigration Judge to ensure that he was speaking to the proposed expert witness, who is a Professor at the University of Illinois at Urbana-Champaign. *See* Exh. 6, Expert Opinion & Curriculum Vitae (including business and residential addresses and telephone numbers, a fax number and email address); *see also United States v. Wong Kim Bo*, 466 F.2d 1298 (5th Cir. 1972) (although identification is required before a telephone conversation is admissible, the standard of certainty is simply one of "reasonableness") (*citing United States v. Bucur*, 194 F.2d 297, 303-304 (7th Cir. 1952); *Morton v. United States*, 60 F.2d 696 (7th Cir. 1932)); *United States v. Carrasco*, 887 F.2d 794 (7th Cir. 1989) ("Any person may identify a speaker's voice if he has heard the voice at any time") (*quoting United States v. Cerone*, 830 F.2d 938, 949 (8th Cir.1987), *cert. denied*, 486 U.S. 1006 (1988)); *United States. v. Alvarez*, 860 F.2d 801 (7th Cir. 1988) (same); Tr. at 11 (we note that the respondent's counsel had spoken with the expert); *Biggs v. INS*, 55 F.3d 1398 (9th Cir. 1995) (holding that the Immigration Judge erred in denying alien's request to have a medical doctor testify by telephone regarding medical hardship, in support of suspension of deportation, and that the BIA erred in dismissing the suspension application for lack of evidence of medical hardship); *United States v. Crown*, 1995 WL 600876 (S.D.N.Y. 1995) (not reported in F.Supp.) (finding no prejudice (continued...)

refusal to do so was fundamentally unfair or that it subjected him to actual prejudice. *See id.*

On appeal, the respondent has failed to argue how allowing the telephonic testimony of the proposed expert witness would have altered the outcome in this case. The Immigration Judge admitted the proffer of the expert's testimony into evidence which, according to the respondent, contained the expert's complete opinion as to why the respondent would be tortured or killed upon return to Colombia (Tr. at 10). *See* Respondent's Letter to Immigration Judge of Dec. 22, 1999, at 1 ("Through a written Expert Opinion, *and, if necessary, through testimony* at the hearing, our expert plans to testify about . . . the fact that [the respondent] has every reason to expect torture or death upon his return to Colombia") (*emphasis added*). Upon reviewing this proffer, we find that the oral testimony of the expert would not alter our affirmance of the Immigration Judge's decision to deny the respondent deferral of removal. The conclusion of the respondent's expert – that the respondent's "death would be likely" if he returned to Colombia – is predicated upon the assumption that the respondent is perceived to have "'betrayed' higher-ups in the drug world as part of a plea-bargain agreement" (Exh. 6, Expert Opinion at 6). This assumption made by the expert was based solely upon information provided to him by the respondent, in that the expert, who had no personal knowledge of the respondent, wrote that he "understand[s] from [the respondent's] statement that,

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[6] (...continued)
from refusal to change venue where the Immigration Judge permitted witness to testify by telephone); *Baraz v. United States*, 181 F.R.D. 449 (C.D. Cal. 1998) (finding that telephonic deposition of witness in lieu of presenting testimony in open court was required by the interests of justice). We further find that the Immigration Judge's concern that the telephonic testimony may not be properly transcribed is an insufficient basis by which to refuse taking an expert's testimony by telephone. *See* section 240(b)(2)(B) of the Act (authorizing "an evidentiary hearing on the merits . . . through a telephone conference with consent of the alien"); 8 C.F.R. § 3.25(c) (same); section 235(b)(1)(B)(iii)(III) (authorizing review of credible fear determinations by telephone without the consent of the alien); 8 C.F.R. § 3.42 (same); *Noorani v. Smith*, 37 F.3d 1505 (9th Cir. 1994) (approving of the Immigration Judge's taking of the expert witness's testimony by telephone, and rejecting the alien's contention that the telephonic testimony was garbled); *Ali-Bukar v. INS*, 60 F.3d 832 (9th Cir. 1995) (noting that the Immigration Judge and Board relied on the telephonic testimony by an expert witness) *Brathwaite v. INS*, 633 F.2d 657 (2d Cir. 1980) (Immigration Judge conducted a telephonic interview with the psychologist during the course of the hearing); *United States v. McCalla*, 821 F.Supp. 363 n.2 (E.D.Pa. 1993) (noting telephonic deportation hearing); *Angeles v. INS*, 729 F.Supp. 479 (D.Md. 1990) (approving of the Immigration Judge allowing alien's counsel to participate in the hearing by telephone); *Ahmad v. Wigen*, 726 F. Supp. 389 (E.D.N.Y. 1989) (court called an expert witness who testified by telephone from Israel). While we find that allowing the proposed expert witness to testify by telephone would have been appropriate in this case, we note that it may be difficult to assess the demeanor of a telephonic witness or to control the information in front of that witness, it would be difficult for such a witness to identify the respondent or documents (if such identification were necessary), and that telephonic testimony may limit the ability of a party to confront an adverse witness. *See Cunanan v. INS*, 856 F.2d 1373, 1375 (9th Cir. 1988); *see also Baliza v. INS*, 709 F.2d 1231, 1234 (9th Cir. 1983); *Bachelier v. INS*, 625 F.2d 902, 904 (9th Cir. 1980); *cf. Bustos-Torres v. INS*, 898 F.2d 1053, 1056 n.2 (5th Cir. 1990).

because he received a relatively light sentence, he is considered a 'government rat' by his coconspirators and their associates" (Exh. 6, Expert Opinion at 6). We note that the statement provided to the expert, which serves as the basis of his opinions, contains as its critical elements two uncorroborated assertions that are inconsistent with and unsupported by the respondent's testimonial account. *Compare* Exh. 4, Statement at 3-4 ("My codefendants . . . are also certainly aware that the 'word on the street' is that I was a government rat . . . I am certain that, as a person who is known as an informant who contributed to the case against a conspiracy to sell and distribute Colombian cocaine, I will be killed very shortly after I arrive in Colombia"), *with* Tr. at 22 (the respondent testified that on only one occasion, almost 5 years ago, one of his codefendants told him that "they (more than one of his codefendants) thought that since [he] was out on bond and also because [he] went in voluntarily . . . they thought that [he] *might* have said something . . . to the Government about them"). For the reasons we addressed previously, we do not find that the respondent is perceived to have "betrayed" his coconspirators or to be a "government rat" (Exhs. 4, 6). Contrary to the statement provided to the proposed expert, the only indication that the respondent was suspected of saying anything to the government was a single statement made to him by one of his codefendants in September 1995 (Tr. at 22). Since the conclusions of the expert which are favorable to the respondent are predicated on factual presumptions which are not supported by the evidence of record, we find that the telephonic testimony of that expert, who had no personal knowledge of the specific facts underlying the respondent's claim, could not have satisfied the respondent's burden of proof for deferral of removal (Exh. 6, Expert Opinion at 1). *See* 8 C.F.R. § 208.16(c)(2). Therefore, we find that the respondent has failed to establish that he was demonstrably prejudiced by the Immigration Judge's refusal to permit the expert to testify telephonically. *See Matter of Santos*, *supra*, at 107-08 (*citations omitted*). Accordingly, the following order will be entered.

ORDER: The appeal is dismissed.

FOR THE BOARD